IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.241 OF 1998

Salim Kadar Inamdar
Age 26 years,
residing at Wada,
Taluka Khed, District-Pune ...Appellant.

v/s

State of Maharashtra ... Respondents

Mr P.B. Shah for Appellant.

Ms P.H. Kantharia, APP for Respondents.

CORAM : V.G. PALSHIKAR & R.C. CHAVAN JJ.

DATE : 21ST JULY 2005.

ORAL JUDGMENT (PER R.C. CHAVAN J.) :-

1. By making this appeal, the appellant seeks to have his conviction for offence punishable under section 302 of I.P.C and the resultant sentence of rigorous imprisonment for life and fine of Rs.500/- or in default rigorous imprisonment for six months, imposed by the learned Additional Sessions Judge, Pune, set aside.

2. Facts which led to prosecution of the appellant are as under :-

. Appellant was married to complainant Nuruddin's daughter Rubina on 19th October 1992. At that time, the appellant was residing alongwith his

parents and brother who were arrayed as co-accused at the trial. Victim Rubina was subjected to ill-treatment since about two months after marriage. This resulted in Rubina's giving a report at Police Station, Khed on 31st July 1993. The matter was however amicably settled. Thereafter, the appellant and Rubina were residing separately from appellant's parents and brother. The appellant however continued to ill-treat Rubina. On the night of 14th November 1993, appellant's neighbours heard loud noise from the tenement of appellant. On hearing cries, neighbours rushed to the appellant's house and found that there was fire inside, with the door closed.

3. A police patrol reached the spot coincidently and policemen caused the door to be opened. Accused opened the door. It was found that victim Rubina had sustained severe burn injuries.

4. Rubina was taken to hospital, police caused her dying declaration to be recorded by calling a Magistrate. The police also recorded statements of witnesses after receiving a complaint from victims' father Nuruddin. Rubina was shifted from Sasoon Hospital to a private clinic where she succumbed to her injuries on 19th November 1993. After performing an inquest, Police sent the body for post mortem examination. Police performed spot panchanama, seized

incriminating articles, caused them to be examined by forensic science laboratory and on completion of investigation charge-sheeted the accused before the Judicial Magistrate, First Class, Rajgurunagar, Khed who committed the case to the Court of Sessions at Pune.

5. The learned Additional Sessions, Judge charged the appellant and three others for offences punishable under sections 498-A read with section 34 and appellant alone for offence punishable under section 302 of the Indian Penal Code. All the accused pleaded not guilty and were put on trial. In order to bring home guilt of the accused, the prosecution examined in all 11 witnesses. Upon consideration of prosecution evidence in the light of defence, the learned Additional Sessions Judge acquitted all the accused persons of charge of offence punishable under section 498-A of the Indian Penal Code and proceeded to convict the appellant alone for offence punishable under section 302 of the Indian Penal Code. He proceeded to sentence the appellant to imprisonment of life and fine of Rs.500/- or in default further imprisonment of five months. Aggrieved thereby, the convict has preferred this appeal.

6. We have heard learned counsel for the appellant as also the learned Additional Public Prosecutor. The learned counsel for appellant submitted that the learned Trial Judge was in error in convicting

the appellant on the basis of one-sided view of the evidence. He submitted that the learned Trial Judge should not have relied on the dying declaration which was the result of the victim having been tutored by her parents. He pointed out that there was a dying declaration recorded immediately after the incident, indicating innocence of the accused, which should not have been brushed aside. He further submitted that the conduct of the victim which was consistent with the innocence of the accused should have been considered by the learned Additional Sessions Judge. Therefore, he urged that the appeal be allowed, which the learned Additional Public Prosecutor opposed.

7. We have gone through the evidence on record with the help of both the learned counsel in order to examine the correctness of the approach of the learned Additional Sessions Judge. In this case, the appellant and his wife had a discord about four months prior to the incident. Victim Rubina had reported to the Police that she had been beaten up and left at Bus Stand at Khed with direction to return to matrimonial home with Rs.25,000/-. This report of Rubina at Exhibit-18 was duly proved by the PW 7 - ASI Tambe. This report has also been referred to in the FIR at Exh.19 filed by PW 3 - complainant Shaikh Nuruddin, victim's father. Thus, it is not that there is no independent evidence whatsoever of discord between the parties prior to the

incident. There is no explanation by the appellant about this report. According to PW 7 - ASI Tambe, the parties had reached a compromise in the matter and therefore, the matter had not proceeded further. Surprisingly, a suggestion was made to PW 7 - ASI Tambe by the defence, which he denied, to the effect that he had compelled the parties to compound the matter. Thus, the existence of dispute as also the unwillingness of the appellant to compound the matter is admitted by the defence. After this compromise, accused Nos.2, 3 and 4 ceased to reside with the couple.

8. PW 1 - Sunanda is neighbour of the appellant and his wife. She stated that the appellant and his wife used to frequently quarrel. The appellant had confined his wife in the house. On hearing cries of the victim, she had seen through the window and found that victim's neck was tied with Odhani and accused had locked the house from outside. She stated that others in the neighbourhood also saw it and brought it to the notice of the landlord. The witness stated that on 14th November 1993, at about 9.00 or 9.30 p.m. they heard noise from the tenement of the accused. This attracted her and others in the neighbourhood. They found that the house was closed from inside. Police on patrolling duty came there and policemen asked the accused to open the door. The accused opened the door and then it was found that the victim had burn injuries. Ladies from

neighbourhood put clothes on the person of the victim. The witness states that hair on the head of victim was also burnt.

9. This deposition of PW 1 - Sunanda is corroborated by PW 5 - P.C. Chand Yasin. He states that at about 11.00 p.m. when he was proceeding towards Police Station to join his duties, he learnt that Rubina was burnt in her residential house. He therefore informed Shri Tambe, the Police Station Officer and came to the spot with PC Beke on motorcycle. He found smoke coming from the room. The door was latched from inside. He and PC Beke knocked the door and asked the accused to open it. As the door was not opened, he asked Inamdar i.e. appellant to open the door whereupon the accused opened the door. They entered the room and found victim sitting in a corner of the house with burn injuries He stated that he asked Anjanabai to put some cloth on the person of victim. The victim was taken in a jeep to Government Dispensary from where PC Beke took her to Sasoon Hospital.

10. The learned counsel for appellant points out two contradictions in the evidence of these two witnesses. First is about time. While PW 1 - Sunanda stated that she heard shouts at about 9.00 or 9.30 p.m., according to PW 5 - PC Chand Yasin, he reached to the spot at 11.00 p.m. The time stated by PW 1 - Sunanda

may not be accurate. She may not have been meticulous in noting down the time. It is noteworthy that she has stated that she and her family members were sleeping inside the house when the incident took place. Thus, it may be more than 9.00 or 9.30 p.m. as stated by her. It may also be seen that PW 5 - PC Chand Yasin has stated that while proceeding to Police Station, he had heard about the incident, he informed his superior and then came to the spot to have the door opened. Thus, there must be some time gap between the moment when PW 1 heard noise and PW 5 reached the spot. It may also be seen that it is nobody's case that when the door was opened, Rubina was still in flames. Thus, burning part of the incident was already over when the door was opened. Only smoke was coming out of the room. Therefore, the discrepancy in time is really no discrepancy and in any case too inconsequential to be given any weight.

11. The learned counsel for appellant also stressed upon another discrepancy about the vehicle on which PW 5 - Chand Yasin reached the spot. PW 1 - Sunanda stated that the policemen had come in a van whereas PW 5 - Chand Yasin stated that he had come on a motorcycle with constable Beke. This too is immaterial since PW 1 - Sunanda was not expected to look at the vehicle in which the policemen came at the spot. The learned counsel for appellant next submitted that

evidence of PW 1 - Sunanda was unworthy of belief because her conduct is unnatural. He stated that if Sunanda had noticed any fire or smoke in the house of accused, ordinarily she should have peeped through the windows. Since Sunanda did not state so, the learned counsel felt that Sunanda was not telling the truth about the incident. How a person would react on learning of such incident would depend on the person's upbringing. Someone may be too curious, while someone may not want involvement. Therefore, there is nothing unnatural in Sunanda's not stating about peeping through a window.

12. The learned counsel appearing for appellant next submitted that the victim's own conduct would indicate that the victim had sustained accidental burns. He stated that if the victim had been set on fire by the accused, immediately upon Constable opening the door, she would have narrated to everyone as to how accused had set her on fire. Neither PW 1 - Sunanda nor PW 5 - Chand Yasin stated that the victim spoke to them about the incident. In order to take advantage of silence of victim, it would have been necessary for the defence to rule out the possibility that the victim had said anything to the persons present there. Because PW 1 or PW 5 do not state on their own as to what victim spoke, it does not follow that the victim did not at all speak, since they have not stated that the victim did not at

all open her mouth.

13. The learned counsel for appellant next submitted that the learned Trial Judge ought to have relied on dying declaration at Exh.39 recorded by the Special Executive Magistrate Shri Pramod Ganu which rules out complicity of the accused in the incident. This dying declaration at Exh.39 was not proved by examining the Special Executive Magistrate. It does not show that the Magistrate had caused the victim to be examined by a Medical Officer before he recorded the dying declaration. Therefore, merely because it was admitted in evidence, it does not become gospel truth in order to wash out the other evidence tendered by the prosecution.

14. It may be seen that admission of piece of evidence only enables the Court to read the same. Just as testimony tendered in the Court is received by the Court, but not necessarily relied upon, or accepted as truth, a document admitted in evidence can be read by the Court but cannot be ipso facto elevated to the level of a proved fact. Doubts about the reliability of dying declaration Exh.39, turn into certainty by cross-examination of PW 5 Chand Yasin on behalf of the appellant. Chand Yasin stated in his cross-examination that when Special Executive Magistrate Ganu recorded dying declaration, accused Salim was with victim Rubina.

Obviously, Rubina was not expected to state in the presence of her husband that her husband had set her on fire. Therefore, this dying declaration has to be excluded from consideration.

15. The learned counsel for appellant submitted that the dying declaration recorded by PW 9 - Special Judicial Magistrate Ulhas Koranne was a result of the victim having been tutored in the meantime by her parents. This dying declaration has been recorded at 3.20 a.m. and not 3.20 p.m. as seems to have been wrongly mentioned in the endorsement by the Medical Officer through over sight. It may be seen that the requisition to Special Judicial Magistrate Exh.30 itself puts time of 3.00 a.m. It may be seen that the incident took place during midnight of 14th November 1993. Victim's father Nuruddin is resident of Ghorpade Peth, Pune, which may be at a short distance from Sasoon Hospital as stated by the learned counsel for appellant. Yet it cannot be ignored that the victim's father came to know of the incident only around 1.15 a.m. as stated by him in the report at Exh.19. In the evidence, the witness has clearly stated that on 15th November 1993, the Police visited his house and informed him about the incident. There is no cross-examination to crystalise the time at which he received information and the time at which he visited his daughter. If the appellant wanted to take advantage of the fact that the Nuruddin

had an opportunity to tutor his daughter, such possibility ought to have been created in cross-examination. On the other hand, the cross-examination shows that when Police visited Nuruddin's house to inform him of the incident, the appellant was also in the same jeep and in the same jeep, Nuruddin proceeded to the Hospital with the appellant.

16. The story of victim having been tutored by her parents, has to be rejected for yet another reason. PW 11 - Dr Ghorpade stated that he was serving in the Burn Ward at Sasoon Hospital. He stated that he asked history of the victim and she gave history of homicidal death. He stated that the Magistrate visited the Hospital and in his presence recorded the statement of the victim after he had examined the patient. He proved his endorsement at Exh.31. It has to be presumed that Dr Ghorpade took history of the patient when the patient was admitted in the ward. That would be well before the parents came to the Hospital. It is noteworthy that the cross-examination of this witness PW 11 - Dr Ghorpade makes no reference to the arrival of parents in the Hospital. Thus, the absence of cross-examination on the point of history given by Rubina to Dr Ghorpade should result in acceptance of word of Dr Ghorpade that the victim had suffered homicidal burns.

17. The learned counsel for appellant tenaciously attacked the evidence of PW 11 - Dr Ghorpade in order to make out something from nothing. He stated that Dr Ghorpade had admitted in cross-examination that the consciousness and mental fitness are distinct things. The learned counsel submitted that Dr Ghorpade had certified that the patient was conscious but had not certified the patient to be fit. This is stretching things too far. PW 11 - Dr Ghorpade stated that he had put some questions to ascertain whether the patient was in a condition to talk. Therefore, even this objection to the dying declaration recorded by PW 9 - Special Executive Magistrate at Exh.31 has to be rejected.

18. The learned counsel for appellant next submitted that the dying declaration at Exh.31 had to be rejected because the victim had tried to rope in her parents-in-law and brother-in-law when they were not at all residing at the place. It is true that in Exh.31 the victim had stated that her husband had set her on fire at the instance of her parents-in-law and brother-in-law. This however does not imply that they gave such provocation to the appellant at the time of incident. This may be an inference of the victim. The learned counsel for appellant submitted that the victim had replied to the next question by saying that all of them had set her on fire by locking her up. The victim was possibly exaggerating in making the allegations

against her in laws but she has clarified by stating that her husband set her on fire. The leaned Trial Judge has rightly recorded acquittal in respect of in-laws by not relying on the parts of the dying declaration indicating their involvement. It does not however follow that the involvement of appellant is also ruled out.

19. The recitals in dying declaration at Exh.31 receive corroboration from the evidence of PW 1 - Sunanda as well as PW 5 - Chand Yasin. When the door was opened by the accused himself and when he was inside the room with his wife, it was for him to explain as to how she sustained burns. The defence now sought to be raised that the victim sustained accidental burn injuries while cooking because of stove burst, is, to say the least, farfetched. The panchanama of spot at Exh.14 shows that there was a stove at the spot, but the stove contained some kerosene. The stove did not show any signs of having burst. If the stove had flared up resulting injuries to the victim, kerosene in the stove would have burnt. The panchanama does not describe the stove as having soot. The victim alleged that kerosene from stove was poured on her and she was put on fire. Therefore, some kerosene remained in the stove and she sustained burns. We may even recall the evidence of PW 1 - Sunanda. She stated that hair on the head of victim also were burnt. Bursting of stove may result in

injuries to portion of the body which is facing the stove. Hair on the head will also get burnt only if kerosene is poured over a person. All these aspects rule out the surmises of the defence.

20. Most importantly, if the victim did sustain accidental burns by stove, it is not clear as to what the appellant was doing? Why he did not immediately call the neighbours for helping him to take the victim to the Hospital? Why he kept the door locked from inside and opened it only after Police Constable commanded him to do so? This conduct is certainly inconsistent with the pretence of innocence sought to be put on by the appellant. It is not shown that either PW 1 - Sunanda or PW 5 - Chand Yasin had any enmity with the appellant. Therefore, on a re-appraisal of evidence, we hold it as proved that the appellant had set his wife on fire.

21. The learned counsel for appellant drew our attention to three decisions of the Supreme Court. In Dandu Lakshmi Reddy v/s State of Andhra Pradesh, reported in AIR 1999 SC 3255, there was question of two contradictory dying declarations resulting in benefit going to the accused. In this case, as the foregoing discussion would show that we have rejected the dying declaration recorded by the Special Executive Magistrate Ganu, as the appellant himself was present when that

dying declaration was recorded. The learned counsel for appellant sought to rely on history recorded by a Medical Officer at Budharani Hospital where the victim was shifted from Sasoon Hospital for further treatment. The Medical Officer at Budharani Hospital had not recorded history of accidental burns. She had innocently recorded history of homicidal burns by in-laws. But, this does not exclude the husband. That history cannot help the appellant in extricating himself from victim's statement to PW 11 - Dr Ghorpade and Special Judicial Magistrate PW 9 - Shri Koranne.

22. In Lella Srinivasa Rao v/s State of Andhra Pradesh, reported at AIR 2004 SC 1720, relied on by appellant's learned counsel, conviction was sought to be based only on dying declaration whereas in the instant case, there are other circumstances as well.

23. We have also considered the ratio of decision of Supreme Court in the case of Gaffar Badshaha Pathan v/s State of Maharashtra, reported in (2004) 10 SCC 589, but could not elicit an inflexible rule that the moment there are two inconsistent dying declarations, the accused must get the benefit.

24. Question of appreciation of evidence in a criminal trial cannot depend upon conclusions of fact drawn by superior courts on appraisal of evidence in

cases before them. Each case would have to be decided on the basis of facts unfolded before the Court from the evidecne tendered. In this case, the learned Additional Sessions Judge had rightly held the appellant guilty of murder of his wife, for which ample unimpeachable and reliable evidence was tendered by the prosecution.

25. In the result, the appeal fails and is dismissed. The learned counsel for appellant seeks time for the appellant to surrender before the learned Sessions Judge. We grant four weeks' time to the appellant to surrender before the learned Sessions Judge, who shall then take steps to have the appellant committed to prison to serve out the rest of the sentence.

(V.G. PALSHIKAR, J.)

(R.C. CHAVAN, J.)